IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.09.2007

CORAM

THE HON'BLE MR.JUSTICE M.JAICHANDREN

Writ Petition Nos.29108 and 29109 of 2007
&
M.P.Nos.1 and 2 of 2007

M.Gomathi Shankar .. Petitioner in W.P.29108/07

S.Surendaranathan .. Petitioner in W.P.29109/07

vs.

1. Income Tax Officer,
   Company Ward IV(1)
   121, M.G.Road, Aayahar Bhawan,
   Main Building, IV Floor,
   Chennai 600 034.

2. Tax Recovery Officer-VII
   Income Tax Department,
   Company Range - IV,
   Chennai 600 034. .. Respondents in both W.Ps.

Writ Petitions filed under Article 226 of the Constitution of India praying for the issuance of a Writ of certiorari, to call for the impugned records of the first respondent in PAN AACCM49676C and quash the order dated 8.8.2007.

For petitioners : Mr.P.Rajkumar

For respondents : Mr.J.Narayanasamy,
Standing Counsel for
Income-tax Dept.

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C O M M O N O R D E R

Heard Mr.P.Rajkumar, learned counsel appearing for the petitioners and Mr.J.Narayanasamy, the learned Standing Counsel appearing on behalf of the respondents.

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2. It is submitted by the petitioners that they were Directors in M/s Meld Chemicals (P) Ltd. which was involved in the manufacturing and trading of Chemicals. The petitioners have resigned from the Board of Directors of the said Company, with effect from 28.02.2003. In compliance with the provisions of the Companies Act, Form 32 had been submitted before the Registrar of Companies, about the change in the Management of the Company. However, the first respondent had issued a show cause notice on 19.07.2007, under Section 179 of the Income Tax Act to the petitioners, with regard to the assessment years 2002-03 and 2003-04. In spite of the petitioners intimating the first respondent that they had already resigned from the Company, the impugned order dated 08.08.2007, had been passed by the first respondent in PAN:AACCM49676C, under Section 179 of the Income Tax Act, 1961, holding the petitioners liable to pay the arrears of tax due from M/s Meld Chemicals (P) Ltd., as stated therein.

3. The main contention of the learned counsel for the petitioners is that the petitioners cannot be held liable under Section 179(1) of the Income Tax Act, 1961, unless there is a finding by the authority concerned that the tax due from the Company cannot be recovered. Further, it is pointed out that neither the show cause notice dated 19.07.2007, issued by the first respondent, nor the impugned order, dated 08.08.2007, passed by the first respondent, contains the finding that the tax due from the Company, viz., M/s Meld Chemicals (P) Ltd. cannot be recovered. Therefore, the show cause notice, dated 19.07.2007, and the impugned order, dated 08.08.2007, passed by the first respondent are illegal and invalid.

4. Mr.J.Narayanasamy, learned Standing Counsel appearing on behalf of the respondents has not refuted the claims made on behalf of the petitioners. It has also been pointed out that a Division Bench of this Court, in C.Rajendran and another vs. Income-Tax Officer, by its order dated 02.08.2001, reported in 253 ITR 139, had held as follows:

> "This section has been amended and it is the amended version which is reproduced above. The language of the section is very clear to suggest that the action under the section can be activated only when the tax due from a private limited company pertaining to the previous year cannot be recovered. The words "cannot be recovered" are most important. The phraseology suggests essentially that in spite of the efforts made as per the procedure followed in the Income-tax Act for recovery of the tax arrears when the said tax arrears cannot be recovered then alone the liability can be transferred

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under section 179(1) of the Income-tax Act to the directors. Therefore, in order to activate this section and the action thereunder, a finding would have to be recorded to the effect that in spite of the efforts to recover the tax arrears the said tax arrears could not be recovered from the assessee-company. The second part of the section comes into effect only thereafter. Firstly, once there is a finding that such tax arrears cannot be recovered then the liability could be transferred to every person who was a director and it would be then for such a person to show that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company and when he discharges this burden, he would no more be required to discharge the tax liability so transferred to him. However, that stage would come only later on, after it is found that the tax arrears cannot be recovered from the assessee-company.

.....

Our attention was drawn by learned counsel for the appellant to the Division Bench judgment in K.V.Reddy v. Assistant CIT [1998] 232 ITR 306 (AP). The Division Bench has taken a similar view therein. The Division Bench observes (page 308):

"The language used in the section is clear. It is only in cases where the tax cannot be recovered from the company that the liability of the director arises. The liability of the directors is joint and several. It is not a joint and several liability with the company. It is not a liability co-extensive with the liability of the company, unlike a principal debtor and the surety. In the case of the principal debtor and surety, the liability of the surety is co-extensive with that of the principal debtor and, therefore, both the principal debtor and the surety can be proceeded against simultaneously. Whereas under section 179 of the Act it is only in case the tax cannot be recovered from the company that the liability of the director arises or the liability itself arises for the director. After that liability arises, the liability is joint and several amongst the directors and it is not a liability joint and several with that of the company.

Therefore, before the Assessing Officer proceeds against the directors personally he has to give a finding that the income-tax due for the previous year cannot be recovered from the company. In the absence of giving a finding conferring jurisdiction on him to recover the income-tax from the director personally, the

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Assessing Officer does not get the jurisdiction to initiate proceedings under section 179 of the Act. In the absence of such a finding, the Assessing Officer does not get jurisdiction to invoke the provisions of section 179 of the Act."

5. Based on the submissions made by the learned counsel for the petitioners and the learned Standing Counsel for the respondents and in view of the order passed by the Division Bench of this Court as noted above, this Court is of the considered view that the show cause notice, dated 19.07.2007, and the impugned order passed by the first respondent, on 08.08.2007, in PAN:AACCM49676C, are set aside, and the first respondent is directed to cause an enquiry with regard to the liability of the petitioners, and to pass appropriate orders, on merits and in accordance with law, expeditiously.

With the above directions, these writ petitions are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

gms

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Income Tax Officer,
   Company Ward IV(1)
   121, M.G.Road, Aayahar Bhawan,
   Main Building, IV Floor,
   Chennai 600 034.

2. The Tax Recovery Officer-VII
   Income Tax Department,
   Company Range - IV,
   Chennai 600 034.

+ 2 ccs to Mr. P. Rajkumar, Advocate SR No. 55469 & 55470

GG(CO)
SR/5.10.2007 W.P.No.Nos.29108 and 29109 of 2007

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